

Joga Singh (Migration) [2023] AATA 1053 (27 April 2023)

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DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANTS:	Mr Joga Singh Mrs Sharanjeet Kaur Master Armaanjoy Singh
REPRESENTATIVE:	Mr Rick Gunn
CASE NUMBER:	2016372
HOME AFFAIRS REFERENCE(S):	BCC2018/3030809
MEMBER:	Stephen Witts
DATE:	27 April 2023
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the applications for Skilled (Residence) (Class VB) visas for reconsideration, with the direction that the first named applicant meets the following criteria for Subclass 887 (Skilled - Regional) visas: • Public Interest Criterion 4020 for the purposes of cl 887.223 of Schedule 2 to the Regulations • The Tribunal also finds that as the primary applicant met the criteria for the grant of the visa that the secondary applicants also met the criteria for the grant of the visa

Statement made on 27 April 2023 at 10:47am

CATCHWORDS

MIGRATION – Skilled (Residence) (Class VB) visa – Subclass 887 (Skilled - Regional) – false or misleading information in the visa application – payments to employer for skills recognition – work experience – Australian Border Force investigation – evidence of work completed and business operations – decision under review remitted

LEGISLATION

Migration Act 1958, ss 5(1), 65

Migration Regulations 1994, Schedule 2, cl 887.223; Schedule 4, Public Interest Criterion 4020; r 1.12

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

3. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 28 October 2020 to refuse to grant the applicants Skilled (Residence) (Class VB) visas under s 65 of the *Migration Act 1958* (Cth) (the Act).
4. The applicants applied for the visas on 12 August 2018. The delegate refused to grant the visas on the basis that the first named applicant (the applicant) did not satisfy the requirements of cl 887.223 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations) because the delegate was not satisfied that the applicant met the requirements of Public Interest Criterion 4020.
5. The applicants appeared before the Tribunal on 27 April 2023 to give evidence and present arguments.
6. The Tribunal also received oral evidence from Mr Fernandez the principal of Christy Motors and Jerome mobile Engineers.
7. The Tribunal hearing was conducted with the assistance of an interpreter in the Punjabi and English languages.
8. The applicants were represented in relation to the review.
9. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

10. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl 887.223 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).

11. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

12. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
13. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
14. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
15. The Tribunal has considered all the material before it including evidence provided prior to the hearing and evidence given at the hearing.
16. The Tribunal notes that it has been provided with a copy of the relevant delegate's decision record by the applicant.
17. In this decision it was contended by the delegate that the applicant did not meet Public Interest Criterion 4020 in that the applicant provided information that is false or misleading in a material particular in relation to the application for the visa, or a visa that the applicant held in the period of 12 months before the application is made.
18. In particular the Tribunal notes that it was contended by the delegate that investigations from Australian Border Force while executing search warrants on 11 September 2019 at the business premises of Jerome Mobile Engineers and Christy Motors uncovered information that the applicant may have entered into a payment scheme with the owner of the business to secure skills recognition under the 'job ready' program.
19. It was also contended by the delegate that the applicant may have made cash payments to the owner of the business, Mr Fernandez, which was then paid back to the applicant as wages, and that therefore the applicant may not actually have been employed by the business as the applicant had claimed.
20. It was further asserted by the delegate that the applicant may have gained fake employment experience and may have only worked for a very short time to pass the required tests for his skills assessment.
21. The Tribunal now turns to the submissions provided prior to the hearing.

22. Applicants' submissions

23. The Tribunal notes it has been provided with a submission by the applicants' representative dated 20 April 2023.
24. It was stated that the primary applicant first worked for the business eight years ago and therefore additional comprehensive documentation in support of the applicant's claims cannot be provided in line with the reporting requirements under the *Corporations Act 2001* (Cth) as the business retained the necessary documentation for the required seven-year period but that some documents are no longer available.
25. It was stated that the primary applicant is an Indian national born in 1987 in Punjab and that he arrived in Australia in 2009 as the holder of a subclass 572 student visa. Prior to his arrival he had already completed a mechanical engineering course at diploma level and had experience in that field.
26. He started working at Jerome Mobile Engineers (JME) in April 2013 where he worked full-time as a motor mechanic until 21 December 2014.
27. On 23 February 2015 the primary applicant received a successful result from his Trades Recognition Australia (TRA) assessment based on his employment with JME.
28. In May 2015 the applicant applied for a subclass 489 visa which was granted in October 2015. In this application the applicant included his employment with JME from April 2013 until December 2014 as a motor mechanic.
29. In August 2018 the applicant then applied for a subclass 887 visa which was refused on the basis that he did not meet the requirements of PIC 4020.
30. It was stated in this submission that the investigation by Australian Border Force on 9 August 2019 and 9 September 2019 was conducted several years after the applicant had ceased employment with Christy Motors and Jerome Mobile Engineers, and that the refusal by the Department was based on a later 'recanted' statement by a person who was at the workshop on the day the business was searched wherein the applicant's name appeared on material acquired in that investigation including on the businesses' bank account statements which indicated that the applicant may have entered into a payment for work scheme.
31. It was stated that the review applicant did not enter a payment scheme and that he did complete his work with that employer as claimed, and they did not provide misleading information to the Department, and that there is no other evidence to support a claim that the primary applicant's employment was not genuine.
32. The Tribunal notes that other submissions were provided relating to financial and bank documents, timesheets, tools, job cards, and evidence of the operation of the business at that time. Also included was further material regarding the applicant's TRA skills assessment.
33. In regard to the potential waiver of PIC 4020 it was stated that the applicant is currently working as a truck driver where he has been a full-time employee for the last six months and that therefore it is in the interests of the Australian business that he should retain his current position noting that truck drivers are in high demand and that there are shortages throughout Australia. It was also stated that the applicant's wife is a casual dental nurse, and the interests of the business will also be affected as she is an important member of staff. It was also stated that the applicant has a son aged five years and that although he is not an

Australian citizen it would inflict significant hardship if he was to return back to India because Australia is the only home he has ever known.

34. In conclusion it was stated that:

35. *“ We submit that the Review Applicant has not provided a bogus document nor false and misleading information in a material particular as defined in PIC 4020(1). He has provided what documents he has available to demonstrate that he was employed at the business for the periods claimed. We submit that the raids conducted on her former place of employment including the allegations which have arisen as a result of those raids cannot be credibly attributed to the Review Applicant’s subclass 887 visa application, particularly where the investigation was conducted over 4.5 years after he ceased work.*

36. *Further, the Review Applicant was able to pass a rigorous practical in-person assessment by TRA on the business premises which resulted in him being awarded a positive skill assessment as a motor mechanic. In the alternative, we submit that there are compelling and compassionate circumstances that effect the interests of the Review Applicant’s employment as a truck driver (and therefore Australia’s interests), that justify the waiver of PIC 4020.”*

37. At the hearing the Tribunal had a discussion with the primary applicant regarding his application.

38. The applicant stated that he first arrived in Australia in 2009 after having completed a diploma level qualification in mechanical engineering back in his home country and working for three years involved in the servicing of heavy vehicles. He stated that in Australia he studied at certificate III level and diploma level in automotive and business management and that he then worked as a kitchen hand for a short period before working as a taxi driver on a part-time basis.

39. He stated that he started work with Christy Motors and Jerome Mobile Engineering in 2013 and worked for this business during the period that he stated to the department that he had worked there as a full-time mechanic and that he also worked part-time as a taxi driver in the evenings during this period.

40. He stated that after his employment with the company he worked for a time driving taxis again and then went back to India in 2016 where he met his wife and that subsequently they married, that he came back to Australia and moved back to Geelong for a period and that since that time he has worked as a truck driver. He stated that he is currently undertaking interstate truck driving work.

41. The Tribunal had a detailed discussion of the applicant regarding his work as a motor mechanic with JME and his skills assessment during this time noting also that the applicant supplied his own tools in this regard and finds that the applicant did genuinely work as a motor mechanic for this company and that he did not provide false or misleading information to the Department.

42. Therefore, the applicant meets PIC 4020(1).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(1)?

43. PIC 4020(2) requires the Tribunal to be satisfied that the applicant and each member of the family unit have not been refused a visa because of a failure to satisfy PIC 4020(1) in the period commencing 3 years before the application was made and ending when the visa is

granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2AA).

44. The Tribunal is satisfied, on the basis of the known information before the Tribunal, that there is no adverse information before the Tribunal concerning the applicant or any member of the family unit (as defined in r.1.12) as having been refused a visa in the relevant period because of a failure to satisfy PIC 4020(1).
45. Therefore, PIC 4020(2) is met.

Has the applicant satisfied the identity requirements?

46. PIC 4020(2A) requires an applicant satisfy the Tribunal as to his or her identity.
47. On the basis of the information and evidence before the Tribunal, the Tribunal is satisfied that the applicant has met the identity requirements required under PIC4020(2A).
48. Therefore, the applicant meets PIC 4020(2A).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(2A)?

49. PIC 4020(2B) requires that neither the applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2BA).
50. As the applicant has met the requirements of PIC4020(2A) the Tribunal is satisfied that PIC4020(2B) does not apply.
51. Therefore PIC 4020(2B) does not apply.
52. On the basis of the above, the applicant does satisfy PIC 4020 for the purposes of cl.887.223

DECISION

53. The Tribunal remits the applications for Skilled (Residence) (Class VB) visas for reconsideration, with the direction that the first named applicant meets the following criteria for Subclass 887 (Skilled - Regional) visas:
 - Public Interest Criterion 4020 for the purposes of cl 887.223 of Schedule 2 to the Regulations
 - The Tribunal also finds that as the primary applicant meets the criteria for the grant of the visa that the secondary applicants also meet the criteria for the grant of the visa

Stephen Witts
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...